

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re:

Amendment of the Commission's
Rules To Preempt State and Local
Regulation of Tower Siting For
Commercial Mobile Services Providers

RM - 8577

DOCKET FILE COPY ORIGINAL

To: The Commission

STATEMENT OPPOSING PETITION FOR RULE MAKING

The law firm of Duncan, Weinberg, Miller & Pembroke, P.C., which represents numerous state and local governmental entities, herewith submits this statement opposing the Petition for Rule Making filed by the Cellular Telecommunications Industry Association ("CTIA"). In support, the following is shown:

1. CTIA has failed to demonstrate any reason for the Commission to engage in rule making. CTIA's Petition is based on speculation and surmise, not on facts and experience. CTIA cites no evidence that commercial mobile radio service providers are experiencing any difficulties locating and constructing new towers.

2. The Commission has, for more than 60 years, regulated various forms of communications and overseen the "rollout" and "build out" of numerous new technologies. Over this same period of time, the

"38,000 different local jurisdictions" that concern CTIA have played a very active role in innumerable tower siting proceedings. All in all, the past sixty years of communications history have evidenced a harmonious relationship between the Commission and state and local jurisdictions. There is extraordinary little history of state and local authorities "barring", "impeding", "interfering", "hampering", "impinging", or otherwise "harming" the development of communications ventures.

3. Duncan, Weinberg, Miller & Pembroke, P.C. represents and advises municipalities across the country, in the States of Alabama, California, Delaware, Florida, Indiana, Maryland, Massachusetts, New York, Ohio, Texas, and Washington, among others. Local jurisdictions in these and other states are excited about the prospects and opportunities offered by PCS and by other emerging technologies. Municipalities anticipate numerous yet unforeseen opportunities for their residents and their local businesses, as well as for the delivery of municipal services.

4. Whether or not the Commission should preempt state and local regulation is a function of whether that state and local regulation creates an obstacle to the accomplishment of a Congressional

purpose. Preemption is a function of conflict between federal regulations and the state/local regulations. CTIA has shown neither obstacles nor conflict.

5. State and local governments perform essential functions relevant to the health, safety and quality of life in their communities. Siting, building codes, and other laws have long co-existed with emerging communications technologies to ensure the safe and beneficial development of new services. CTIA has not shown any conflict between the full and timely development of PCS and the obligations of municipalities to ensure the health, safety, and environmental protection of their communities, because no such conflict can be shown.

6. While the importance to state and local governments of their laws is not the focus of the Commission's inquiry, the historical and traditional role of state and local government in zoning and land use matters must be recognized. The Commission should not disregard that critical role, as CTIA is requesting. CTIA would have the Commission assume the role of national land use manager -- a task which would be almost impossible for the Commission to perform. Rather, the Commission should respect the important role of state and local government in protecting the health, safety and quality of life of its citizens.

7. The lone instance cited by CTIA where the Commission does expressly "preempt" local regulation -- earth stations (Section 25.104 of the Rules) -- is essentially a non-discrimination provision and leaves considerable discretion with local authorities. In the amateur radio service, also cited by CTIA, Section 97.15(e) of the Rules provides that state and local regulation may not "preclude", but must "reasonably accommodate", amateur service communications. The amateur rule specifically recognizes the existence of "the state or local authority's legitimate purpose."

8. Nothing in Section 332 of the Communications Act authorizes the action requested by CTIA, or evidences any Congressional purpose that would require preemption. The statutory prohibition against state or local regulation of "the entry of . . . any commercial mobile service or any private mobile service" has nothing whatsoever to do with zoning and land use. CTIA's argument is creative and imaginative. However, it is without basis in fact or logic. There is no showing how local zoning and land use regulations would "regulate the entry" of service. There is no evidence that such regulations have ever regulated "the entry" of any service.

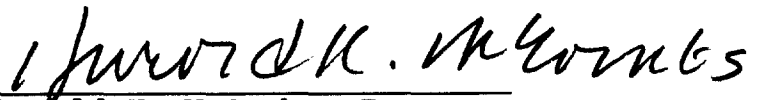
9. Potential Commercial Mobile Radio

Service providers have known about, and planned their systems in light of, the existence of state and local zoning and land use regulations. The entire Personal Communications Services technical and regulatory structure developed without objection to the lawful exercise of state and local regulations.

10. CTIA notes that it was established "as the trade association of the cellular industry", that it "represents the wireless industry", and that its membership is "open to all . . . who provide commercial mobile radio services". In addition to cellular radio operators, CTIA members include "the nation's largest providers of enhanced specialized mobile radio ("ESMR") service." Unquestionably, the cellular and ESMR industries are strong, vibrant, growing and flourishing. They have arrived at this point in their development without the need for federal preemption of state and local tower siting regulations. CTIA makes no case why the Commission should now change its position.

WHEREFORE, Duncan, Weinberg, Miller &
Pembroke, P.C. requests that the Commission deny the
CTIA Petition for Rule Making, pursuant to Section
1.407 of the Rules and Regulations.

Respectfully submitted,



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February 17, 1995

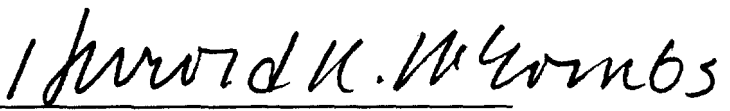
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CERTIFICATE OF SERVICE

I, Harold K. McCombs, Jr. do hereby certify that I have caused to be served by mail, First Class postage prepaid, this 17th day of February, 1995, copies of the foregoing "Statement Opposing Petition For Rule Making" on the following:

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